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No. 90-1670

In The

Supreme Court of the United States

October Term, 1991

KATHLEEN E. CONNORS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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In its brief in opposition, the government asserts that the Court of Appeals below explicitly adopted and applied a *de novo* standard of review for all legal issues, making *Salve Regina College v. Russell*, ___ U.S. ___, 113 L.Ed.2d 190 (1991) inapplicable, and remand unnecessary. Its brief states: "Here, too, there is no basis to assume that the Court of Appeals framed its opinion disingenuously, professing to employ *de novo* review while surreptitiously deferring to the district court."[1] To say the least, it is the government that is being disingenuous.

[1] Brief for the United States in Opposition ("Govt. Brief") 6.

Every time the Court of Appeals actually discussed or reviewed any district court determination or discussion on the substance of Texas proximate cause law, it explicitly invoked the deferential standard that *Russell* discarded, and used the traditional language associated therewith.

First, the Court of Appeals' opinion states:

> "Almost twenty pages into the trial court's opinion, and after a most searching consideration of the facts, it turns to the law. At 720 Federal Supplement, pages 1278 and 1279, the court states clearly that the governing law is that of Texas, briefly outlining that law and referring to representative Texas authorities discussing proximate cause. The court's discussion of Texas proximate cause law alone covers over half of a printed page."[2]

Instead of reviewing whether the district court's brief outline of Texas substantive proximate cause law is accurate and supports an objective or subjective proximate cause standard or test, the Court of Appeals explicitly invokes the deferential standard:

> "The trial judge has enjoyed a long experience of the law of Texas – his native state – and it has long been the view of our Circuit that the views of such jurists as to state law are deserving of great weight."[3]

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[2] 919 F.2d at 1086 (Pet. App. 15-16).

[3] *Id.*

It then cites to *Westinghouse Electric Supply Co. v. Wesley Construction Co.*, 414 F.2d 1280, 1281 n.1 (5th Cir. 1969). That footnote is also explicit:

> "As in all matters such as this which involve matters of state law, we accord great weight to the interpretation by the trial judge as to the law of his own state concerning which he has had long experience."[4]

Similarly, in response to Petitioners' demonstration that the District Court's proximate cause holding appears to represent an application of precomparative negligence and contributory negligence principles long discarded under Texas law, the Court of Appeals deferentially assumed that the District Court was not "ignorant (and uninformed by counsel) of a decade's development in Texas tort law. . . . "[5]

The government, using elided quotations and unjustified editorial inserts, inappropriately seizes upon the three appearances of the term *"de novo"* at two points in the opinion. In a summary of Petitioners' arguments, the Court of Appeals stated:

> "Appellants [Petitioners] commence their argument on this head by suggesting that we may review the district court's conclusion on proximate cause *de novo*. We disagree; although the law applied by the district court is reviewable *de novo*, the ultimate determination of proximate cause, like a finding of negligence, is a

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[4] *Westinghouse Electric Supply Co. v. Wesley Construction Co.*, 414 F.2d 1280, 1281 n.1 (5th Cir. 1969).

[5] 919 F.2d at 1087 (Pet. App. 17).

> finding of fact that is reviewable under the clearly erroneous standard only."[6]

And in the later section entitled *"Appellant's Arguments Considered"*, it stated:

> "Appellants' most serious contention is the first set out above: That the trial court applied some law of proximate cause other than that of Texas and hence arrived at an erroneous result. We review such claims of legal error *de novo*, but a careful examination of this one leaves us unconvinced."

These full quotations demonstrate clearly that the Court of Appeals was never discussing or reviewing any District Court determination on an unsettled question of Texas proximate cause law when it employed the term *"de novo"*. In the first instance, the Court of Appeals was discussing whether a proximate cause determination represents a fact finding or a legal conclusion, and responding to Petitioners' argument that the clearly erroneous standard does not apply to appellate review of a district court's application of law to fact. In the second instance, the discussion concerned the false issue of whether the District Court made a choice of law determination to apply Louisiana rather than Texas law.[7]

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[6] 919 F.2d 1085 (Pet. App. 12).

[7] Petitioners never argued that the District Court made a choice of law determination to apply the law of a jurisdiction other than Texas on the proximate cause issue. The government manufactured this false issue from Petitioners' demonstration that the District Court's citation to *Black v. United States*, 441

(Continued on following page)

The government correctly notes that the Court of Appeals never expressly discussed Petitioners' argument on the unsettled question of whether Texas law requires application of an objective proximate cause standard or test.[8] That is precisely the problem. Since the Court of Appeals never addressed that critical unsettled Texas law issue and only employed the deferential standard language any discussion of the substance of Texas proximate cause law, it either failed to address and resolve the objective standard claim altogether, or resolved it through deference to the district court. The result is either a total absence of appellate review, or inadequate appellate review. *Russell* makes either unacceptable.

Finally, the government asserts that it argued below that it could escape liability even under the objective standard for proximate cause.[9] While it did argue entitlement to judgment under either an objective or subjective proximate cause standard, the government's brief reformulated the objective proximate cause standard to include consideration of the probable effect of a warning

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F.2d 741 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971), a contributory negligence case decided under Louisiana law, did not provide any support for the district court's statement of a purported general rule of Texas proximate cause law. The Court of Appeals' opinion does address and reject this argument, even though Petitioners never made it.

[8] Govt. Brief 8 n.4.

[9] Govt. Brief 8.

on a reasonably prudent crew with the actual *and* constructive knowledge of the Delta 191 crew. That reformulation really converts its objective test to a subjective test.

Petitioners assert that the critical proximate cause issue under Texas law is different: what would have been the probable effect of full and timely warnings and advice concerning the hazards of the Cell D thunderstorm based on the government's actual and constructive knowledge on a reasonably prudent incoming crew with only the actual (not constructive) knowledge of the Delta 191 crew (*i.e.*, unaware because it had not used its on board radar) about the development, existence, location, and intensity of the Cell D thunderstorm. The government never argued that it could avoid liability under that objective proximate cause test. In fact, through its own witnesses and its own filings, the government effectively admitted it could not.[10]

Contrary to the government's assertions, the Court of Appeals' opinion explicitly employs the deferential standard of review that *Russell* discarded in discussing or reviewing any District Court determination on Texas proximate cause law. Since there is no direct authority on whether Texas applies an objective or subjective proximate cause standard, this is precisely the situation involving an unsettled question of state law that the *Russell* court noted might alter the appellate outcome. "Thus, the mandate of independent review will alter the appellate outcome only in those few cases where the appellate

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[10] *See* Pet. 14-16; Pet. App. 104-06.

court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error."[11] At the very least, the Court of Appeals' explicit citation to a deferential standard case, its use of deferential standard language, and the Fifth Circuit's long history of employment of the deferential standard make it appropriate for the Fifth Circuit to review this case in light of the intervening *Russell* decision.

Respectfully submitted,

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[11] ___ U.S. ___, 113 L.Ed.2d at 202